

COMMUNICATION

FROM

THE SECRETARY OF STATE,

IN RELATION TO

The modification of the act entitled "An act to carry into effect certain provisions in the treaties between the United States and China, and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries," approved August 11, 1848.

MAY 18, 1860.—Referred to the Committee on Foreign Relations and ordered to be printed.

DEPARTMENT OF STATE,
Washington, May 16, 1860.

SIR: I have the honor to acknowledge the receipt of your communication requesting the department to frame and transmit to you the draft of a bill embodying the modifications suggested in a former communication, of the act entitled "An act to carry into effect certain provisions in the treaties between the United States and China, and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries," approved August 11, 1848, with a view to remedy any defects in the existing law, and also to extend its provisions to other countries with which we have now similar treaty stipulations.

The importance of the subject, requiring careful consideration, and the length of time necessarily occupied in the examination of the voluminous correspondence of our ministers and consuls in China and Turkey during the last twelve years, in order to ascertain the practical operation of the existing law, and to profit by their suggestions, have delayed till this time an answer to your communication. It has been thought expedient also to submit the draft of the bill framed in the department to the careful analysis of the Solicitor of the Treasury, who has recommended several provisions suggested by his practical acquaintance with cases arising in our courts affecting the duties of consular officers.

Advantage also has been taken of the views presented in the opinion of the late Attorney General concerning the judicial authority of the commissioner or minister and of consuls of the United States in China and Turkey, a copy of which is herewith transmitted.

The act of Congress of 1848, which it is proposed to amend, is a most important and valuable one. A careful study of every one of its provisions has impressed me with a renewed sense of the sagacity and wisdom of the distinguished statesman, Judge Butler, who is reputed to have been its framer. After the lapse of twelve years, during which it has been in practical operation, few imperfections have been discovered, and only such as might be expected to appear in an act making provision for a description of cases new in form, at least to the legislation of Congress, for the extension of the civil and criminal jurisdiction of the United States over its citizens in distant foreign countries.

It is important that provision should be made for the summary punishment of crimes and offenses when committed by American citizens in the dominions of those rulers who have surrendered to the United States all jurisdiction over them, under a solemn engagement on our part that the power thus conferred shall be faithfully executed. At present, these stipulations in existing treaties, so far as relate to our citizens in Japan and Siam, are a dead letter. No authority whatever has been given to American consuls in those countries to try, convict, and punish our citizens for offenses committed there. Should a flagrant crime be perpetrated upon a Japanese or a Siamese by any of our citizens, and should punishment not follow, according to the requisitions of the treaties, this might disturb if not destroy our friendly relations, and do great injury to our commerce. Accustomed as these nations are to summary justice, they could not be made to understand why criminals who are citizens of the United States should escape with impunity, in violation of treaty obligations, whilst the punishment of a Japanese or a Siamese who had committed any crime against an American citizen would be rigorously exacted.

Even in China and Turkey, although our functionaries in those countries are invested with the requisite authority, justice is delayed, and oftentimes thwarted, from the want of places of confinement in which to imprison offenders. In reference to this point, I beg leave to refer to Executive Document No. 68, Thirty-fifth Congress, second session, pages 64 to 92, and also to a recent dispatch from the American minister in China.

Under existing treaties with Tripoli, Tunis, Morocco, and Muscat, all disputes between citizens of the United States in these countries are to be decided by the proper consul; and in the three former, whenever he shall require any aid to enforce his decisions, it is to be immediately granted by the government of the countries.

The mode in which these judicial powers shall be executed by consuls has not yet been prescribed by Congress.

It is expedient, also, that provision be made that consular officers, appointed to reside in barbarous or savage countries, where no governments are recognized by any treaty of the United States, should be authorized to exercise their primitive functions of municipal magistrates; their powers should be defined, and the mode indicated in which they should be exercised.

After these preliminary observations, I proceed to an explanation of the several sections of the bill. Comparatively few changes, except verbal ones, have been made in the law of 1848, which has been taken

as the foundation of the accompanying bill, but, as it will subsequently appear, several sections have been added to it, for the purpose of supplying its deficiencies.

The *title* of the bill has been framed so as to include within its provisions Japan, Siam, and Persia, under the treaties negotiated with those countries, respectively. (See Statutes at Large, volume 11, pages 684, 710, and 723.)

The alterations in the first three sections of the existing law are verbal ones, intended only to extend the existing provisions of law to Japan and Siam, and to designate the class of officers appointed to execute them; ministers resident, and not commissioners, being now appointed to reside in China, Japan, and Turkey.

In the fourth section the words, "including equity and admiralty" are introduced after the words "common law," in order to embrace within the provisions of the act classes of cases which occasionally arise in those countries. In the fifth, sixth, and seventh sections, verbal changes only are made without altering the sense. In the eighth section the word "misdemeanors" is introduced after the word "offenses," and punishments for contempt are limited. No change is made in the ninth section. In the tenth section the words "selected by lot," are inserted after the words "four in number," in order that the defendants may be more certain to have disinterested persons to sit on the trial as assessors with the consul. For the same purpose, the following clause has been introduced, that these assessors shall be selected "from a list of individuals which shall have been nominated for the purposes of this act to the minister and received his approval." In the twelfth, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth, and twentieth sections, the verbal changes are all of an unimportant character, and do not change the sense of the existing law. It is to be remembered that so much of the act as relates to "Macao," in the second section, was repealed by the act of September 20, 1850; and the eighteenth section, allowing compensation to the minister and consuls for judicial services, was also repealed by the twentieth and thirty-third sections of the act of August 18, 1856. It is not proposed to recommend any additional compensation for these officers for such services—their salaries having been increased in 1856, in lieu of the appropriation of \$1,000 which was annually made prior to that time, as compensation for the judicial services of our functionaries in China.

In the thirteenth section, the words "by appeal" are introduced after the words "before him," in order to avoid a conflict of opinion, which has occasionally arisen between a minister and consul upon the question whether the jurisdiction of the minister be original or appellate. A reference to the opinion above mentioned, of the Attorney General, will show that the proper construction of the law is that the minister's jurisdiction is appellate only, except in certain specified cases.

A clause has been added to the twenty-first section of the law of 1848, to authorize the minister and consuls in Turkey to exercise jurisdiction in *civil* cases wherein the same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks or other foreign Christian nations. A reference to the dispatches from the

United States legation, printed in document No. 68, above mentioned, will show the necessity of this provision. The only alteration in the twenty-third section has been to indicate the functionaries who are clothed with judicial powers by the provisions of the act.

Section twenty-four is a new section added to the law of 1848, and specifies certain classes of crimes, namely: murder, insurrection, piracy, and offenses against the public peace amounting to felony, which may be tried originally before the ministers in the said countries. The twenty-fifth section of the new bill authorizes the appointment of a limited number of marshals, and the payment of the actual and necessary expenses incurred in the case of prisoners, and for rent of suitable places of confinement, the want of such provision will be seen by reference to the printed correspondence of our ministers and consuls in China and Turkey, accompanying this communication, relating to this subject. (See Ex. Doc. No. 68, above mentioned.)

At the close of this section a new paragraph is added, providing a remedy in case of the misconduct of any of the marshals who may be appointed under the provisions of the act.

The twenty-sixth section authorizes the allowance of a limited sum for the rent of suitable places of confinement for American prisoners, either awaiting trial or under sentence of the courts, and for the care and safe-keeping of the same.

The want of such provision will be seen by reference to the printed correspondence of our ministers and consuls in China and Turkey. (See Ex. Doc. No. 68, above mentioned, pages 64 to 90, and also the dispatch relating to this subject, recently received from our minister in China.)

Section twenty-seven is a new section, and declares that the jurisdiction of the minister shall be appellate only, except in certain specified cases.

Section twenty-eight is also a new section, and extends the provisions of the act to Persia in respect to all suits and disputes for which provision is made by our treaty with that country. (See Statutes at Large, vol. 11, page 710.)

Section twenty-nine of the bill authorizes and requires our consuls in Tripoli, Tunis, Morocco, and Muscat to exercise certain judicial powers, under the provisions of treaties of the United States with those countries. (See Statutes at Large, volume 8, pages 160, 216, 217, 459, and 486.)

Section thirty extends, to a limited extent, the benefit of the provisions of the act to American citizens living in islands or in countries not inhabited by any civilized people, and not recognized by any treaty with the United States. It authorizes our consular officers in such islands and countries to exercise the powers which they originally possessed, in all places, at the institution of the consular office, and to discharge the duties of municipal magistrates in all cases arising among their countrymen requiring their intervention.

Section thirty-one of the bill gives validity to the rite of marriage, when solemnized by our consular officers in foreign countries. Until within a comparatively recent period, these officers have been accustomed to perform this ceremony without question, but a doubt having

arisen in regard to the legality of such marriages, and the matter having been referred to the Attorney General, an opinion has been given that consuls possess no such power, and cannot lawfully celebrate a marriage between either foreigners or even Americans, "unless expressly authorized by the law of their own country."

Since the publication of this decision and the prohibition to consuls to solemnize the rite, serious inconveniences have resulted therefrom, and these have borne with especial severity upon poor but respectable individuals in Germany, desiring to emigrate to this country, where the impediments to matrimony and the expenses attending it enter into the inducements of emigration. It becomes an object, especially with females, to obtain, before emigrating to the United States, an assured matrimonial contract, certified under the hand and seal of an American consul.

If the authority be given, as suggested by the Attorney General, it will have a tendency to promote good morals, and be particularly advantageous to the female emigrant, the party needing the most protection.

The concluding sections simply embrace the usual repealing clauses, and indicate the time when the act is to go into effect.

I am, sir, your obedient servant,

LEWIS CASS.

Hon. J. M. MASON,

*Chairman of Committee on Foreign Relations,
United States Senate.*

